



*VIA email*

June 7, 2017

U.S. EPA Freedom of Information Officer  
77 W. Jackson Blvd.  
Chicago, Illinois, 60604-3507  
r5foia@epa.gov

**Re: Freedom of Information Act request – Records regarding Indiana authorization of discharges from coal mining operations under 327 IAC Article 15 Rule 7**

Dear FOIA Officer:

On behalf of the Sierra Club, Hoosier Environmental Council, and the Environmental Law and Policy Center, I am writing to request that the U.S. Environmental Protection Agency (“U.S. EPA”) provide copies of the records described below pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and the U.S. EPA regulations at 40 C.F.R. § Subchapter A, Part 2. This request is sent to you (and electronically to U.S. EPA Headquarters) because you were identified at 40 CFR §2.101 as the proper person to receive such requests. If this request should be directed at another person, please forward this request to that person.

Sierra Club is the nation’s oldest grassroots organization. It has more than 2.7 million members and supporters nationwide. Sierra Club is dedicated to the protection and preservation of the natural and human environment. Sierra Club’s purpose is to explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth’s ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments.

Sierra Club is a leading non-governmental organization seeking to educate and mobilize the public on issues of climate change, fossil fuel energy and clean energy. It has been conducting multiple public campaigns around these issues, including its Beyond Coal Campaign and Dirty Fuels Campaign. This request is made on behalf of those campaigns, as well as the organization’s long-standing interest in government accountability and transparency.

The Hoosier Environmental Council (HEC) is Indiana's leading educator and advocate for environmental issues and policies. HEC maintains a website through which it informs its members and the general public of issues relating to Clean Energy and Clean Water.

The Environmental Law and Policy Center (ELPC) is the Midwest's leading public interest environmental legal advocacy and eco-business innovation organization. It too maintains a website through which it informs its members and the general public regarding Clean Energy and Clean Water issues.

Sierra Club, HEC and ELPC have all actively worked on issues regarding water pollution from coal mines located in Indiana for over a decade.

**Sierra Club, HEC and ELPC Request the Following Records:<sup>1</sup>**

1. Records relating to development of Indiana's program for regulating discharges of pollutants from coal mining operations to waters of the United States and any approval by U.S. EPA of Indiana regulatory programs of discharges from coal mining operations;
2. Records regarding any consideration by U.S. EPA of the compliance of 327 IAC Article 15 with the Clean Water Act, particularly Rule 7 of 327 IAC Article 15 which relates to coal mining;
3. Records regarding any request from the Indiana Department of Environmental Management (IDEM) for approval by U.S. EPA of 327 IAC Article 15, particularly Rule 7 of 327 IAC, under Section 303(c) of the Clean Water Act, 33 U.S. C. § 1313(c), Section 303(e) of the Clean Water Act, 33 U.S. C. §1313(e), or 40 CFR §131.13;
4. Records regarding adverse effects of coal mining operations on Indiana water quality;
5. Records relating to discussions between U.S. EPA and the IDEM regarding 327 IAC Article 15 and coal mining discharges in Indiana;
6. Records relating to changes to be made or that should be made to Indiana regulation of discharges that have been permitted by IDEM under 327 IAC Article 15 and discharges from coal mining operations.

**Duty to Preserve Records**

U.S. EPA must preserve all of the records requested herein while this FOIA is pending or

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<sup>1</sup> "Records" means information of any kind, including writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), letters, memoranda, correspondence, notes, applications, completed forms, studies, reports, reviews, guidance documents, policies, telephone conversations, telefaxes, e-mails, documents, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. Without limitation, the records requested include records relating to the topics described below at any stage of development, whether proposed, draft, pending, interim, final or otherwise. All of the foregoing are included in this request if they are in the possession of or otherwise under the control of U.S. EPA, and all its Offices, Regions and other subdivisions.

under appeal. U.S. EPA shall not destroy any records “while they are the subject of a pending request, appeal, or civil action under the FOIA.” 7 C.F.R. § 1.24; *see Chambers v. U.S. Dep’t of Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2009) (“an agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under FOIA or the Privacy Act”).

If any of the requested records are destroyed, the agency and responsible officials are subject to attorney fee awards and sanctions, including fines and disciplinary action. Indeed, a court has held EPA in contempt for “contumacious conduct” and ordered the agency to pay plaintiff’s costs and fees for destroying “potentially responsive material contained on hard drives and email backup tapes.” *Landmark Legal Found. v. EPA*, 272 F.Supp.2d 59, 62 (D.D.C. 2003); *see also Judicial Watch, Inc. v. Dep’t of Commerce*, 384 F. Supp. 2d 163, 169 (D.D.C. 2005) (awarding attorneys’ fees and costs because, among other factors, agency’s “initial search was unlawful and egregiously mishandled and ...likely responsive documents were destroyed and removed”), *aff’d in relevant part*, 470 F.3d 363, 375 (D.C. Cir. 2006) (remanding in part to recalculate attorney fees assessed). In another case, in addition to imposing a \$10,000 fine and awarding attorneys’ fees and costs, the court found that an Assistant United States Attorney prematurely “destroyed records responsive to [the] FOIA request while [the FOIA] litigation was pending” and referred him to the Department of Justice’s Office of Professional Responsibility. *Jefferson v. Reno*, 123 F. Supp. 2d 1, 6 (D.D.C. 2000).

### **Exempt Records**

Should you decide to invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information for the Sierra Club, HEC and ELPC to appeal the denial. To comply with legal requirements, the following information must be included:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of a record requested are exempt from disclosure, please redact the exempt portions and provide the remainder of the record to the Sierra Club at the address listed below.

### **Fee Waiver Request**

I respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 7 C.F.R. § 1.5. The Sierra Club, HEC and ELPC have spent years promoting the public interest through the development of policies that protect human health and the environment, and have routinely received fee waivers under FOIA.

The Sierra Club, HEC and ELPC are nonprofit environmental organizations with no commercial interest in obtaining the requested information. Instead, the Sierra Club, HEC and ELPC intend to maintain public websites containing the requested information, so the public can access this important information regarding pollution in their communities.

As explained below, this FOIA request satisfies the factors listed in U.S. EPA's governing regulations for waiver or reduction of fees, as well as the requirements of fee waiver under the FOIA statute – that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

1. The subject matter of the requested records must specifically concern identifiable “operations and activities of the government.”

The requested records relate to data that the U.S. EPA currently maintains on publicly available websites. These activities are unquestionably “identifiable operations or activities of the government.” The Department of Justice Freedom of Information Act Guide expressly concedes that “in most cases records possessed by a federal agency will meet this threshold” of identifiable operations or activities of the government.

2. The disclosure of the requested documents must have an informative value and be “likely to contribute to an understanding of Federal government operations or activities.”

The FOIA Guide makes it clear that, in the Department of Justice's view, the “likely to contribute” determination hinges in part on whether the requested documents provide information that is not already in the public domain. First, the circumstances of U.S. EPA's approval (if any) of Indiana's purported compliance with the Clean Water Act as to discharges from coal mines and certain other operations subject to 327 IAC 15 and any possible justification for such approval is unknown to the public. Further, the effect of the operation of Indiana's Rule 7 on Indiana water quality and its legality under law is of vital concern to residents of Indiana and residents of states downstream of Indiana. The requested information will facilitate meaningful public participation in the decision-making process, therefore fulfilling the requirement that the documents requested be “meaningfully informative” and “likely to contribute” to an understanding of your agency.

3. The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Under this factor, the identity and qualifications of the requester—i.e., expertise in the subject area of the request and ability and intention to disseminate the information to the public—is examined.

The Sierra Club, HEC and ELPC and their members have long-standing experience and expertise in the subject area of FOIA requests, specifically issues related to energy production, and the Clean Water Act. Sierra Club, HEC and ELPC also have a long-standing interest in

government accountability and transparency and proper enforcement of federal environmental laws.

Sierra Club, HEC and ELPC disseminate the information they receive through FOIA requests in a variety of ways, including, but not limited to: analysis and distribution to the media, distribution through publication and mailing, posting on website, emailing and list serve distribution to the organizations' members across the U.S., and via public meetings and events. Every year the Sierra Club website receives 40,730 unique visits and 100,381 page views; on average, the site gets 104 visits per day. Sierra Magazine, which is a quarterly magazine published by the Sierra Club, has a circulation of approximately 1,000,000. Sierra Club Insider, an electronic newsletter, is sent to over 850,000 people twice a month. In addition, Sierra Club, HEC and ELPC disseminate information obtained by FOIA requests through comments to administrative agencies, and where necessary, through the judicial system. In the past, the Sierra Club, HEC and ELPC have published, posted, and disseminated numerous stories on coal and coal power plants, regarding their impacts on health, the environment and alternative energy. This includes information on various webpages, such as the Sierra Club's [Beyond Coal Campaign](#) portal, the Sierra Club's [Clean Energies Solutions](#) portal, [HEC's Clean Water webpage](#), [ELPC's Clean Water](#) and [Climate Change](#) webpages and press releases.<sup>2</sup>

Sierra Club, HEC and ELPC intend to share the information received from this FOIA request with the public.

Sierra Club, HEC and ELPC unquestionably have the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner outlined above, and to do so in a manner that contributes to the understanding of the “public-at-large.”

4. The disclosure must contribute “significantly” to public understanding of government operations or activities. The public’s understanding must be likely to be enhanced by the disclosure to a significant extent.

The records requested will contribute to the public understanding of the U.S. EPA’s “operations and activities,” as the requested records include U.S. EPA databases. The disclosure of the requested records is essential to the public’s understanding of U.S. EPA’s operations and activities, U.S. EPA oversight of the delegated Indiana Clean Water Act program, and the validity or illegality of Indiana's regulation of discharges from coal mining operations. After disclosure of these records, the public understanding of U.S. EPA’s activities will be significantly enhanced. The requirement that disclosure must contribute “significantly” to the public understanding is therefore met.

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<sup>2</sup> For example, the Sierra Club sought information about coal export and permitting activities in Oregon via a state public records act request at the Port of Coos Bay. All correspondence is published online and has received extensive media attention from press releases on the subject. *See* <http://content.sierraclub.org/environmentallaw/lawsuit/2013/sierra-club-challenges-dirty-and-dangerous-fossil-fuel-exports-oregon>.

5. Whether the requester has a commercial interest that would be furthered by the requested disclosure.

The Sierra Club, HEC and ELPC have no commercial interest in the requested records. Nor do they have any intention to use these records in any manner that “furthers a commercial, trade, or profit interest” as those terms are commonly understood. The Sierra Club, HEC and ELPC are tax-exempt organizations under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, and as such have no commercial interest. The requested records will be used for the furtherance of the mission of the organizations to inform the public on matters of vital importance to the environment and public health.

6. Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is “primarily in the commercial interest of the requester.”

When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order to compare it to the “public interest” in disclosure. If no commercial interest exists, an assessment of that non-existent interest is not required.

As noted above, the Sierra Club, HEC and ELPC have no commercial interest in the requested records. Disclosure of this information is not “primarily” in the organizations' commercial interest. On the other hand, it is clear that the disclosure of the information requested is in the public interest. It will contribute significantly to public understanding of U.S. EPA's activities.

The Sierra Club, HEC and ELPC respectfully request, because the public will be the primary beneficiary of this requested information, that U.S. EPA waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4)(A) and 7 C.F.R. § 1.5. In the event that your agency denies a fee waiver, please send a written explanation for the denial. Also, please continue to produce the records as expeditiously as possible, but in any event no later than the applicable FOIA deadlines.

### **Record Delivery**

In responding to this request, please comply with all relevant deadlines and other obligations set forth in FOIA and the agency's regulations. 5 U.S.C. § 552(a)(6)(A)(i); 7 C.F.R. § 1.7. Please produce the records above by sending them to me at the address listed below. Please produce them on a rolling basis; at no point should the search for—or deliberation concerning—certain records delay the production of others that the agency has already retrieved and elected to produce.

### **Sierra Club, HEC and ELPC request all records be produced in a format that can easily be downloaded in bulk.**

Thank you for your cooperation. If you find that this request is unclear in any way please

do not hesitate to call me to see if I can clarify the request or otherwise expedite and simplify your efforts to comply. I can be reached at 773.818.4825 or by e-mail at Ettinger.Albert@gmail.com.



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Albert Ettinger,  
Counsel for Sierra Club and authorized as to this  
FOIA request to represent Hoosier Environmental  
Council and the Environmental Law and Policy  
Center  
53 W. Jackson Suite 1664  
Chicago, Illinois 60604